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In The

Supreme Court of the United States

L. SATHYAVAGLSWARAN, M.D. IN HIS OFFICIAL CAPACITY AS CHIEF MEDICAL EXAMINER-CORONER OF THE COUNTY OF LOS ANGELES, AND ANTHONY T. HERNANDEZ, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE COUNTY OF LOS ANGELES CORONER'S OFFICE AND COUNTY OF LOS ANGELES DEPARTMENT OF CORONER,

Petitioners,

v.

ROBERT NEWMAN, AS FATHER AND NEXT OF KIN OF RICHARD A. NEWMAN AND BARBARA OBARSKI, AS MOTHER AND NEXT OF KIN OF KENNETH S. OBARSKI, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the next-of-kin's right to possess a relative's dead body for burial or other disposition, treated under California law as a "quasi property" interest, a "property interest" within the meaning of the Fourteenth Amendment of the United States Constitution, such that the next-of-kin may state a claim for deprivation of their property without due process under 42 *U.S.C.* section 1983?

If the next-of-kin's interest in a relative's dead body is constitutionally protected, under what circumstances, if any, will a taking without a pre-deprivation hearing be excused or justified?

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PETITION FOR WRIT OF CERTIORARI

L. Sathyavaglswaran, M.D., in his official capacity as Chief Medical Examiner-Coroner of the County of Los Angeles, Anthony T. Hernandez, in his official capacity as the Director of the County of Los Angeles Coroner's Office, and the County of Los Angeles, Department of the Coroner (the "Coroner Defendants" or "Petitioners") respectfully pray a writ of certiorari issue to review the judgment and opinion of the Ninth Circuit entered in this proceeding on April 16, 2002.

The case involves a novel and important issue; whether the right existing under California state law for next-of-kin to possess a relative's dead body for burial or other disposition is a sufficient property interest to warrant due process protection under the Fourteenth Amendment of the United States Constitution, thus entitling the next-of-kin to state a claim under 42 *U.S.C.* section 1983. By holding that it is, the decision by the Ninth Circuit sides with the Sixth Circuit, which addressed Ohio and Michigan state law on the subject of property rights in dead bodies. The federal Circuit Court of Appeal decisions on the subject conflict with decisions from the Georgia and Florida supreme courts which have held that the legal interests of the next-of-kin in those states were not of constitutional dimension. Review should be granted to address this constitutional issue and resolve the conflict between state and federal decisions on the subject.

The issue is particularly important because investing next-of-kin with a property interest of constitutional dimension in their relatives' dead bodies will have a deleterious impact on organ and tissue donation by undermining

the immunity provisions of organ and tissue donation statutes enacted on the state level nationwide.

OPINIONS BELOW

The opinion of the District Court is unreported. (App., *infra*, C-1.) The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is published and is reported at 287 F.3d 786 (April 16, 2002). (App., *infra*, A-1 through A-29.) Panel rehearing and/or rehearing en banc was denied by the Ninth Circuit on June 14, 2002. (App., *infra*, D-1 through D-2.)

JURISDICTION

The United States District Court for the Central District of California dismissed the Complaint against the Coroner Defendants for failure to state a cause of action under 42 *U.S.C.* section 1983. (App., *infra*, B-1 through B-3.) Respondents appealed that decision. On April 16, 2002, the Ninth Circuit entered its judgment and opinion reversing the District Court. The order denying the Coroner Defendants' timely filed Petition for Panel Rehearing And/Or Rehearing En Banc was entered June 14, 2002. (App., *infra*, D-1 through D-2.) Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 *U.S.C.* section 1254(1).

STATUTES INVOLVED IN THIS CASE

The United States Constitution, amend. XIV, section 1 states in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 *U.S.C.* section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 *U.S.C.A.* § 1983 (West Supp. 2002).

Former *California Government Code* section 27491.47, in effect at the time relevant to this dispute, read as follows:

> (a) Notwithstanding any other provision of law, the coroner may, in the course of an autopsy, remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody, if all of the following conditions are met:
>
> (1) The autopsy has otherwise been authorized.

> (2) The coroner has no knowledge of objection to the removal and release of corneal tissue having been made by the decedent or any other person specified in Section 7151.5 of the Health and Safety Code.
>
> (3) The removal of such tissue will not unnecessarily mutilate the body, be accomplished by enucleation, nor interfere with the autopsy.
>
> (4) The tissue will be removed by a coroner, licensed physician and surgeon, or a trained transplant technician.
>
> (5) The tissue will be released to a public or nonprofit facility for transplant, therapeutic, or scientific purposes.
>
> (b) Neither the coroner nor medical examiner authorizing the removal of the corneal tissue, nor any hospital, medical center, tissue bank, storage facility, or person acting upon the request, order, or direction of the coroner or medical examiner in the removal of corneal tissue pursuant to this section, shall incur civil liability for such removal in an action brought by any person who did not object prior to the removal of the corneal tissue, nor be subject to criminal prosecution for the removal of such corneal tissue pursuant to the provisions of this section.

Cal. Gov't Code § 27491.47 (West 1988).

In 1998, the statute was amended and *California Government Code* section 27491.47 currently provides:

> (a) Notwithstanding any other provision of law, the coroner may, in the course of an autopsy, remove and release or authorize the removal and release of corneal eye tissue from a body within

the coroner's custody, if all of the following conditions are met:

(1) The autopsy has otherwise been authorized.

(2) The coroner has no knowledge of objection to the removal and release of corneal tissue having been made by the decedent or any other person specified in Section 7151 of the Health and Safety Code and has obtained any one of the following:

(A) A dated and signed written consent by the donor or any other person specified in Section 7151 of the Health and Safety Code on a form that clearly indicates the general intended use of the tissue and contains the signature of at least one witness.

(B) Proof of the existence of a recorded telephonic consent by the donor or any other person specified in Section 7151 of the Health and Safety Code in the form or an audio tape recording of the conversation or a transcript of the recorded conversation, which indicates the general intended use of the tissue.

(C) A document recording a verbal telephonic consent by the donor or any other person specified in Section 7151 of the Health and Safety Code, witnessed and signed by no less than two members of the requesting entity, hospital, eye bank, or procurement organization, memorializing the consenting person's knowledge of and consent to the general intended use of the gift.

The form of consent obtained under subparagraph (A), (B), or (C) shall be kept on file by the requesting entity and the official agency for a minimum of three years.

(3) The removal of the tissue will not unnecessarily mutilate the body, be accomplished by enucleation, nor interfere with the autopsy.

(4) The tissue will be removed by a coroner, licensed physician and surgeon, or a trained transplant technician.

(5) The tissue will be released to a public or nonprofit facility for transplant, therapeutic, or scientific purposes.

(b) Neither the coroner nor medical examiner authorizing the removal of the corneal tissue, nor any hospital, medical center, tissue bank, storage facility, or person acting upon the request, order, or direction of the coroner or medical examiner in the removal of corneal tissue pursuant to this section, shall incur civil liability for the removal in an action brought by any person who did not object prior to the removal of the corneal tissue, nor be subject to criminal prosecution for the removal of such corneal tissue pursuant to the provisions of this section.

Cal. Gov't Code § 27491.47 (West Supp. 2002).

California Health & Safety Code section 7100 reads as follows:

The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in, and the duty of interment and the liability for the reasonable cost of interment of such remains devolves upon the following in the order named:

(a) The surviving spouse.

(b) The surviving child or children on the decedent.

> (c) The surviving parent or parents of the decedent.
>
> (d) The person or persons respectively in the next degrees of kindred in the order named by the laws of California as entitled to succeed to the estate of the decedent.
>
> (e) The public administrator when the deceased has sufficient assets.

Cal. Health & Safety Code § 7100 (West Supp. 2002).

California Health & Safety Code section 7150.5(h) provides:

> An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after donor's death.

Cal. Health & Safety Code § 7150.5 (West Supp. 2002).

California Health & Safety Code section 7150.5(*l*) provides:

> Any signed statement that is in compliance with this Chapter, or a driver's license or identification care that meets the requirements for validity set forth in subdivision (b) of Section 12811 of the Vehicle Code or subdivision (b) of Section 13005 of the Vehicle Code, shall be honored and no further consent or approval from the next of kin or other person listed in subdivision (a) of Section 7151 shall be required.

Cal. Health & Safety Code § 7150.5 (West Supp. 2002).

California Health & Safety Code section 7151(a) provides:

> (a) Except as provided in Section 7152, any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or part of the decedent's body or a pacemaker for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:
>
> (1) The agent under a power of attorney for health care that expressly authorizes or does not limit the authority of the agent to make an anatomical gift of all or part of the principal's body or a pacemaker.
>
> (2) The spouse of the decedent.
>
> (3) An adult son or daughter of the decedent.
>
> (4) Either parent of the decedent.
>
> (5) An adult brother or sister of the decedent.
>
> (6) A grandparent of the decedent.
>
> (7) A guardian or conservator of the person of the decedent at the time of death. . . .

Cal. Health & Safety Code § 7151(a) (West Supp. 2002).

California Health & Safety Code section 7151.5(a) states in pertinent part:

> (a) Except as provided in Section 7152, the coroner or medical examiner may release and permit the removal of a part from a body within that official's custody, for transplantation, therapy, or reconditioning, if . . .
>
> . . .

(2) A reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of their option to make, or object to making, an anatomical gift. Except in the case where the useful life of the part does not permit, a reasonable effort shall be deemed to have been made when a search for the persons has been underway for at least 12 hours. . . .

(3) The official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in subdivision (a) of Section 7151. . . .

Cal. Health & Safety Code § 7151.5(a) (West Supp. 2002).

California Health & Safety Code section 7152.5 states:

(a) If, at or near the time of death of a patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital shall comply with the protocol developed pursuant to Section 7184.

. . .

(d) If, at or near the time of death of a patient, a hospital knows that an anatomical gift has been made pursuant to subdivision (a) of Section 7151 or a release and removal of a part has been permitted pursuant to Section 7151.5, or that a patient or an individual identified as in transit to the hospital is a donor, the hospital shall notify the donee if one is named and known to the hospital; if not, it shall notify an appropriate procurement organization. The hospital shall cooperate in the implementation of the anatomical gift or release and removal of a part. . . .

Cal. Health & Safety Code § 7152.5 (West Supp. 2002).

California Health & Safety Code section 7155.5(c) provides:

> A hospital, physician, surgeon, coroner, medical examiner, local public health officer, enucleator, technician, or other person, who acts in accordance with this chapter or with the applicable anatomical gift law of another state or a foreign country or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding.

Cal. Health & Safety Code § 7155.5(c) (West Supp. 2002).

California Government Code section 27491.45 provides in pertinent part:

> . . .
>
> (2) Parts of the body . . . may be released by the coroner . . . either upon consent of the decedent or other person, as specified in Section 7151 of the Health & Safety Code, or after a reasonable effort has been made to locate and inform persons listed in subdivision (a) of Section 7151 of the Health and Safety Code of their option to consent or object to the release, and the appropriate person consents or that effort has been unsuccessful.

Cal. Gov't Code § 27491.45 (West Supp. 2002).

California Health & Safety Code section 7155 provides:

> (a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation, therapy, or reconditioning, if removal of the part is intended to occur after the death of the decedent.

(b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transplantation, or implantation of a part.

(c) A person who violates this section is guilty of a felony and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, a fine not exceeding fifty thousand dollars ($ 50,000), or both.

Cal. Health & Safety Code § 7155 (West Supp. 2002).

42 *U.S.C.* section 274e states:

(a) Prohibition.

It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.

(b) Penalties.

Any person who violates subsection (a) shall be fined not more than $ 50,000 or imprisoned not more than five years, or both.

(c) Definitions.

For purposes of subsection (a) of this section:

(1) The term "human organ" means the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation.

(2) The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ.

(3) The term "interstate commerce" has the meaning prescribed for it by section 321(b) of Title 21 [the Federal Food, Drug and Cosmetic Act § 201(b)].

42 *U.S.C.A.* § 274e (West 1991).

STATEMENT OF THE CASE

In a 2-1 published opinion filed April 16, 2002, the Ninth Circuit held that the next-of-kin of two decedents properly stated a claim against the Coroner Defendants under 42 *U.S.C.* section 1983, for deprivation of their property without due process under color of state law.

Respondents are the parents of two adults who were autopsied at the County Coroner's office after their deaths and whose corneas were removed without prior notice to or the consent of Respondents. Respondents sued on behalf of themselves and all others similarly situated.

At the time of the removal of the corneas from the decedents in question, *California Government Code* section 27491.47 expressly authorized the Coroner to remove corneal eye tissue if the Coroner had no knowledge of any objection to the removal. The statute was enacted to deal with a public health crisis; an extreme shortage of corneal

eye tissue for transplantation. In recognition of the medical need for the corneal eye tissue to be removed, optimally within six hours of death for the tissue to be useable for transplantation, the statute did not require the Coroner to seek out the decedent's relatives or obtain their express consent to the removal of the corneal eye tissue. Furthermore, the statute expressly immunized the Coroner from civil or criminal liability for removal of corneal tissue under the statute.

The majority decision of the Ninth Circuit concludes that the Respondents had a sufficient property interest in the possession of their relatives' dead bodies to state a federal civil rights claim for deprivation of their property without notice by County officials acting under the authority of the state corneal tissue removal statute.

Judge Ferdinand F. Fernandez, dissenting, disagreed. The dissent concludes that the right of sepulchre or burial afforded to next-of-kin "on grounds of decency, consideration for others, and pragmatism" is not a property interest in the dead body itself and is not of sufficient dimension or character entitled to receive federal constitutional protection.

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Between The Federal And State Courts To Address The Issue

This case involves a novel constitutional issue as to which there is a conflict between the few federal and state courts to address the issue.

This is a case of first impression in the Ninth Circuit. The Sixth Circuit, the only other federal Circuit Court to address the issue, has concluded that Michigan and Ohio law grant to the next-of-kin a property interest of constitutional dimension in a relative's dead body sufficient to state a claim under section 1983, in cases challenging a similar cornea removal statute or seeking damages for the removal of the corneas without the next-of-kin's notice and consent under a cornea removal statute. *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995) (Michigan statute);[1] *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) (Ohio statute).

In contrast, the highest courts of Florida and Georgia have concluded that the next-of-kin have no property interest of constitutional dimension in a relative's dead body under those states' laws. *Georgia Lions Eye Bank, Inc. v. Lavant*, 225 Ga. 60, 335 S.E.2d 127, 128 (Ga. 1985) ("quasi property" rights are "not . . . of constitutional dimension"); *State v. Powell*, 497 So.2d 1188, 1191 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987) ("All authorities generally agree that the next-of-kin have no property right in the remains of a decedent"); *cf. Crocker v. Pleasant*, 778 So.2d 978 (Fla. 2001) (allowing a section 1983 claim for coroner's burial of dead body without notice and consent of relatives and distinguishing *Powell* on the grounds that its holding was limited to analysis of constitutionality of the

[1] *But see Dampier v. Grace Hospital Corp.*, 233 Mich. App. 714 (1999) (holding that claim under Michigan Constitution for deprivation of property without due process failed "because Michigan does not recognize a property right in a dead body," despite recognizing that *Whaley* had decided otherwise with respect to a federal constitutional claim).

cornea removal statute and because the intrusion on the next-of-kin's rights was far outweighed by public health interest in cornea transplantation).

This case thus raises the important constitutional question as to which there is a very significant difference of opinion; whether an interest recognized by state law, but which is not recognized under the state common law as a true "property right," is entitled to protection under the United States Constitution and can therefore implicate liability under the Constitution or federal civil rights statutes, such as 42 *U.S.C.* section 1983.

The Coroner Defendants submit that Judge Fernandez's Dissenting Opinion, not the Majority Opinion, was correct in determining that the next-of-kin's right to possess a relative's dead body for burial – referred to as a "quasi-property" interest under California common law – is not of constitutional character or dimension and certainly not a sufficiently substantive right to outweigh the government's compelling public policy interest in increasing the availability of tissues and organs for transplantation and promoting tissue and organ donation.

II. The Decision Improperly Elevates To Constitutionally Protected Status A "Right" That Is Not Recognized As A True Property Interest Under California Law And Undermines The State's Ability To Regulate The Disposition of Biologic Material And Dead Bodies

As this Court has explained: "Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source

such as state law. . . . " *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 537 (1985).

Under California common law, the rights of next-of-kin in their relative's dead body have been extremely limited. *See Sinai Temple v. Kaplan*, 54 Cal. App. 3d 1103, 1110, 127 Cal. Rptr. 80, 85 (1976) (next-of-kin's right exists "for the limited purpose of determining who shall have its custody for burial."); *Enos v. Snyder*, 131 Cal. 68, 69, 63 P. 170, 171 (1900) ("there is no property in a dead body"). Although the California common law accorded the relatives the right of custody for burial, the courts have qualified the next-of-kin's right as merely a "quasi-property" right. *See, e.g., Sinai Temple*, 54 Cal. App. 3d at 1110.

The limited common law right of next-of-kin to a relative's dead body has been further restricted by case law and statutes governing the disposition of dead bodies and handling of human remains and body parts. *See, e.g., Cal. Health & Safety Code* §§ 7000-7902. For example, under California law, the Coroner has the discretion to perform an autopsy without the consent of the deceased's family. *See, e.g., Donaldson v. Lungren*, 2 Cal. App. 4th 1614, 1623, 4 Cal. Rptr. 2d 59 (1992) (coroner has duty to investigate deaths by suicide or homicide and may take custody of body for autopsy); *Huntly v. Zurich Gen'l Acc. & Liab. Ins. Co.*, 100 Cal. App. 201, 280 P. 163 (1929). The Coroner is statutorily entitled to maintain custody over the body in the case of any death which is the subject of investigation by the Coroner and is not obligated to surrender the remains until the conclusion of the autopsy or medical investigation. *Cal. Health & Safety Code* § 7102. The transportation of the dead and disposition of

remains are specifically regulated. *See, e.g., Cal. Health & Safety Code* §§ 7050.5, 7051, 7052, 7054, 7054.1, 7054.4, and 7055. Likewise, the transfer of body parts for consideration is expressly prohibited under California law, as it is under federal law. *See Cal. Health & Safety Code* § 7155 and 42 *U.S.C.* § 274e. Indeed, the Coroner is expressly authorized to remove body parts or tissue from the deceased if it is necessary or advisable for scientific investigation and training in the Coroner's office (*Cal. Gov't Code* § 27491.45), or for investigating infant deaths from "sudden infant death syndrome" (*Cal. Gov't Code* § 27491.41).

As the California Supreme Court previously explained in *Moore v. Regents of the University of California*, 51 Cal. 3d 120, 135, 271 Cal. Rptr. 146 (1990), referencing several statutes dealing with dead bodies and body parts including former *Government Code* section 27491.47, the corneal tissue removal statute at issue here:

> [T]he laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes . . . to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Moore, 51 Cal. 3d at 137 (emphasis added) (footnotes omitted).

The court in *Moore* went on to conclude that where a statute expressly regulates the disposition of anatomical parts, human tissues, and human remains, "*the statute eliminates so many of the rights ordinarily attached to*

property that one cannot simply assume that what is left amounts to 'property' or 'ownership' . . . . " 51 Cal. 3d at 141 (specifically referring to *California Health & Safety Code* § 7054.4) (emphasis added).

The petitioning Coroner Defendants submit that respect for those who have lost their loved ones has not evolved into a "property interest" of sufficient character under California law to deserve federal constitutional protection. To the contrary, California law has over the years restricted and limited the rights of next-of-kin in dead bodies as necessary to serve other compelling governmental interests, including the medical and police interests in investigating death from unknown or suspicious origins, the public health interest in regulating the disposition of dead bodies, the societal interest in prohibiting the trafficking in body parts, tissues and organs and, in the case of former *Government Code* section 27491.47 here in dispute and *Health & Safety Code* section 7150, *et seq.* (adopting the 1987 version of the Uniform Anatomical Gift Act ("UAGA") in California), the public health interest in promoting tissue and organ donation and transplantation. Moreover, whatever is left of the common law interest of the next-of-kin to possess a relative's dead body after such regulation simply does not amount to "property" and is certainly not a property interest of constitutional dimension or character.

As the Arizona Court of Appeal put it most candidly in addressing the state cases relating to the next-of-kin's purported "property interest" in a dead body:

> In most of these cases, the courts have talked of a somewhat dubious "property right" to the body . . . which did not exist while the decedent was living, cannot be conveyed, can be used only for

> the purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected under a fiction likely to deceive no one but a lawyer.

Ramirez v. Health Partners of Southern Arizona, 193 Ariz. 325, 332, 972 P.2d 658, 665 (Ariz. App. 1998) (upholding summary judgment in favor of defense on next-of-kin's claims, including their constitutional claims, relating to unauthorized removal of relative's bones for transplantation allegedly in violation of UAGA as enacted in Arizona).

A "legal fiction" is not entitled to federal constitutional protection. As Justice Fernandez's Dissenting Opinion correctly recognized, the "quasi property" interest in a relative's dead body existing under California law created "on grounds of decency, consideration for others, and pragmatism" is insufficient in dimension or character to be treated as a "property interest" entitled to federal constitutional protection. By affording the interest constitutional weight, the Ninth Circuit has extended to the next-of-kin a property interest that never previously existed under California law and is, in fact, incompatible with existing state statutes regulating dead bodies.

III. The Decision Will Promote Federal Claims Based Upon Conduct Expressly Authorized Under State Tissue And Organ Removal Statutes, Including The Uniform Anatomical Gift Act As Adopted In The States, Thereby Undermining The States' Strong Public Health Interest In Favor Of Anatomical Gifts

Apart from the conflict in the federal and state decisions on the constitutional dimension of a next-of-kin's interest in a dead body, the decision below is of exceptional importance because of its deleterious impact on the public policy interest in favor of organ donation underlying the corneal eye tissue, as well as other organ and tissue removal statutes enacted in California and virtually every other state. As the California Supreme Court cautioned in the *Moore* case, corneas, tissues, organs and other biologic matter are *sui generis* and the absence of any California case creating liability for the use of such biologic material by treating it as ordinary chattel or personal property "raises a flag of caution." 51 Cal. 3d at 135.

Although the California corneal removal statute in question has been amended to now require the consent of next-of-kin prior to the removal of corneal tissue, the statute was in effect from 1983 until 1998 when it was amended. Corneal eye tissue removal statutes similar to the former California statute also continue to exist in approximately 10 other states. California and other state's legislatures enacted corneal eye tissue removal statutes based upon an expressed public health interest allowing removal of corneal eye tissue after a reasonable, but unsuccessful, search for the next-of-kin or, like in the case of former *California Government Code* section 27491.47, merely in the absence of any known objection, without

specifically requiring notice and consent of next-of-kin. *See, e.g., Ohio R. Code* § 2108.60 (Anderson 2002) (authorizing removal where no knowledge of an objection); *N.C. Gen. Stat.* § 130A-391 (2000) (authorizing removal where no known objections); *Mich. Comp. Laws* § 333.10202 (2002) (same).

Some statutes impose both a reasonable attempt to contact and a no known objection requirement. *See, e.g., Okl. Stat. Ann., tit. 63,* § 2210.1 (2002) (authorizing cornea removal after reasonable attempt to contact next-of-kin and no knowledge of any objection); 20 *Pa. Cons. Stat.* § 8641 (2001) (same); *Ind. Code Ann.* § 36-2-14-19 (Michie 2002) (imposing a duty to make a reasonable attempt to contact next-of-kin within six hours of time of death, but allowing removal of corneas if no knowledge of objection to removal and donation of corneas); *Miss. Code Ann.* § 41-61-71 (2001) (authorizing removal after a reasonable attempt to determine next-of-kin has failed or where there is a belief that there are no next-of-kin to be contacted). The various states' legislatures enacted these "presumed consent" statutes in recognition of the quick action generally required to transplant corneal eye tissue successfully.

Corneal removal statutes are not the only statutes implicated by the decision in this case. A majority of the states have adopted in whole or substantial part the Uniform Anatomical Gift Act ("UAGA"), permitting the removal of organs for donation and transplantation from decedents. In virtually every state to have adopted the UAGA, the statute allows for tissue or organ removal based upon the authority of the donor made while living, including consent that might appear on the donor's driver's license or registration. *See, e.g.*, Uniform Anatomical Gift

Act (1987) ("UAGA"), 8A *Uniform Laws Annotated* ("*U.L.A.*") 47 (West 1993) § 5, and annotations thereto.

The donor's consent is deemed irrevocable under the UAGA after the donor's death. UAGA § 2(h), 8A *U.L.A.* 34. Under the UAGA, hospitals, medical staff, and coroners are entitled to rely upon the donor's consent and *no consent or concurrence is required of any other person, including next-of-kin*. UAGA § 5, 8 *U.L.A.* 47; *see also Cal. Health & Safety Code* § 7150.5(h) (West Supp. 2002).

The coroner is also allowed under the UAGA to permit the removal of a body part after a reasonable effort "taking into account the useful life of the part" to locate the decedent's medical records for evidence of the donor's consent or to inform next-of-kin or other persons entitled to object under the UAGA. UAGA § 4(a)(2), 8A *U.L.A.* 43. As the Comments to Section 4 of the UAGA explain, the UAGA attempts to balance the societal interest in increasing the size of the donor pool with the family's interest, but the balance is weighted in favor of the former interest by limiting the duty to search based upon "the useful life of the part." The limitation recognizes the very short time available in many cases for the successful recovery of critical tissue, which in the case of corneal tissue is optimally within six hours of death. UAGA, § 4, Comments, 8 *U.L.A.* 44-45.

The UAGA, like the California statute at issue here, also includes an immunity provision that expressly immunizes persons against civil or criminal liability for failure to discharge one's duties under the statute, including the reasonable search and notification of next-of-kin. UAGA § 5(f), 8A *U.L.A.* 47.

The UAGA has been adopted in one form or another in all states, including California. In general, the states' legislatures that have adopted the UAGA and related tissue and organ statutes, including presumed consent statutes, have affirmatively chosen to weigh the societal interest in favor of organ donation and increasing the donor pool over the decedent's family's interests.

By holding, as it does, that the next-of-kin have a property interest in a dead body at the time of their relative's death, the Ninth Circuit's decision in this case creates a perplexing problem for enforcement of the UAGA as adopted in the states. If a new "bundle of rights" is created upon death and vests in a different person, not the decedent, the UAGA's treatment of the donor's consent to tissue or organ donation as irrevocable may be superfluous. The question becomes not whether the donor consented while alive, but whether the *new property owners, the decedent's next-of-kin*, will consent to deprivation of their new-found property interest in their relative's body to allow tissues or organs to be removed from the body. The decedent no longer has any interest in that body because his or her prior interest has been extinguished by death. According to the Majority Opinion, the property interest in the dead body of the next-of-kin springs to life after the relative's death and is sufficiently deserving of constitutional protection to require notice to the next-of-kin and a pre-deprivation hearing before any tissue or organ removal can take place, thus giving rise to a cause of action for damages for the taking of the tissues or organs without such a pre-deprivation hearing.

The Ninth Circuit's opinion raises substantial questions regarding the enforcement of any "presumed consent" provisions of existing state tissue or organ donation

statutes, the ability to rely upon the purportedly "irrevocable consent" of a tissue or organ donor given while alive, and the ultimate effectiveness of immunity provisions contained in tissue and organ donation statutes enacted at the state level, including the UAGA. At bottom, if federal claims under 42 *U.S.C.* section 1983 may be brought against coroners, hospitals and other persons acting under the authority of tissue and organ removal statutes by next-of-kin who did not consent to the removal of their relatives' tissues or organs, the threat of liability will have a deleterious chilling effect on organ retrieval and transplantation.

IV. If Nothing Else, This Court Should Address The Proper Due Process Inquiry To Take Place In The Proceedings Below

Declining to deem former *California Government Code* section 27491.47 unconstitutional on its face, the Majority Opinion nonetheless determined that the statute "eliminated procedural safeguards" due the next-of-kin. (Opinion, *infra*, at A-23.) At the same time, the court expressed the opinion that no constitutionally acceptable post-deprivation process was available because the former statute itself expressly immunized the Coroner from any civil liability for actions taken under the statute. (*Id.* at A-24, fn. 16.) Yet, the court inexplicably remanded for further proceedings to determine whether the Coroner Defendants' failure to afford a pre-deprivation hearing to the plaintiffs in this case was "justified," concluding: "[w]hether extraordinary situations justify the failure of the coroner to afford a predeprivation hearing turns on issues of fact that cannot be properly examined at this stage of the litigation." (*Id.* at A-25.) The Majority

Opinion thus suggests that some "extraordinary" or "exigent" situations would justify the removal of corneas without a pre-deprivation hearing.

The Majority Opinion requires the District Court to make a case-by-case inquiry as to the circumstances surrounding the cornea tissue removal of each decedent. Yet, *California Government Code* section 27491.47 was expressly enacted because of an extreme shortage of corneal eye tissue for transplantation and based upon a legislative finding that "the 24 hour search period required under the UAGA is not compatible for 'harvesting' corneal eye tissue" and "the optimum time for removing corneal tissue is within 6 hours of death." (Appellees' Supplemental Excerpts of Record, pp. 10-11.) As a result, the legislature determined that "no search for the next-of-kin was required." (*Id.*) The exercise of the State's power to legislate on the issue under its police power has not been challenged herein and is not reasonably subject to dispute.

The Coroner Defendants submit that the existence of "extraordinary" or "exigent" circumstances should be conclusively determined by the prior legislative determination of a corneal tissue shortage crisis that necessitated the enactment of former *California Government Code* section 27491.47. If the legislature's crisis determination did not suffice to justify the Coroner Defendants' removal of the decedents' corneas without the prior consent of their next-of-kin, what other "justification" may the Coroner Defendants offer for their conduct in reliance upon the former statute? Should the requirement of a pre-deprivation hearing in a particular tissue removal case turn on the existence of "competing interests" at the time of removal? If so, will the constitutional violation depend on the need for the particular type of organ or tissue at the

time of removal or the existence of a particularly compelling transplant candidate in need of the organ or tissue at that exact time? The Majority Opinion simply offers no guidance on the issue and federal case law involving "exigent circumstances" justifying warrantless searches and seizures hardly provides a useful analogy or an appropriate legal framework for deciding this unique and weighty due process issue.

The case-by-case analysis suggested by the court's Majority Opinion below appears to devolve upon the District Court the uncomfortable and improper task of evaluating decisions involving tissue or organ removal based upon hindsight. Yet, public health policy regarding organ and tissue removal and its regulation must be and should be reserved for the legislative branch and is not a proper subject for judicial determination.

More importantly, the public policy in favor of organ donation will be greatly undermined if hospitals and coroners' offices have no clear guidelines as to whether a pre-deprivation hearing or other process is required in advance of tissue or organ removal and, if not, what conditions would justify dispensing with a pre-deprivation hearing in a tissue or organ removal situation. One's ultimate liability will depend, not on good faith compliance with the state tissue or organ removal statute in effect at the time, but upon a court's analysis of the federal due process issue only after a lawsuit is filed. Furthermore, the existence of immunity provisions in the state organ and tissue removal statutes will be unavailing in defense of any federal claims. As a result, there will be a deleterious chilling effect on the willingness of hospitals and coroners to engage in any tissue or organ removal out of fear of civil liability. The life-saving and life-enhancing

benefits from organ and tissue donation will necessarily be jeopardized.

This Court should address this unconventional procedural due process issue that has ramifications for organ and tissue donation nationwide.

CONCLUSION

For all the reasons discussed, this petition for certiorari should be granted.

DATED: September 12, 2002

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT NEWMAN, as father and next of kin of RICHARD A. NEWMAN and BARBARA OBARSKI as mother and next of kin of KENNETH S. OBARSKI, individually and on behalf of all other similarly situated individuals,
Plaintiffs-Appellants,

v.

L. SATHYAVAGLSWARAN, M.D., in his official capacity as Chief Medical Examiner-Coroner of the County of Los Angeles; ANTHONY T. HERNANDEZ, in his official capacity; COUNTY OF LOS ANGELES, Department of the Coroner,
Defendants-Appellees.

No. 00-55504

D.C. No.
CV-99-10751-JSL

OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted
October 17, 2001 – Pasadena, California

Filed April 16, 2002

Before: James R. Browning, Ferdinand F. Fernandez and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher;
Dissent by Judge Fernandez

COUNSEL

Bill Colovos, Southgate, Michigan, for the plaintiffs-appellants.

Cheryl A. Orr and Aaron M. Peck, Arter & Hadden LLP, Los Angeles, California, for the defendants-appellees.

OPINION

FISHER, Circuit Judge:

Parents, whose deceased children's corneas were removed by the Los Angeles County Coroner's office without notice or consent, brought this 42 U.S.C. § 1983 action alleging a taking of their property without due process of law. The complaint was dismissed by the district court for a failure to state a claim upon which relief could be granted. We must decide whether the longstanding recognition in the law of California, paralleled by our national common law, that next of kin have the exclusive right to possess the bodies of their deceased family members creates a property interest, the deprivation of which must be accorded due process of law under the Fourteenth Amendment of the United States Constitution. We hold that it does. The parents were not required to exhaust post deprivation procedures prior to bringing this suit. Thus, we hold that they properly stated a claim under § 1983.

I. FACTUAL AND PROCEDURAL BACKGROUND

In reviewing the district court's dismissal of the complaint under Rule 12(b)(6), "we must 'take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving

party.'" *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1196 (9th Cir. 1998) (quoting *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996)). Robert Newman and Barbara Obarski (the parents) each had children, Richard Newman and Kenneth Obarski respectively, who died in Los Angeles County in October 1997. Following their deaths, the Office of the Coroner for the County of Los Angeles (the coroner) obtained possession of the bodies of the children and, under procedures adopted pursuant to California Government Code § 27491.47 as it then existed,[1] removed the corneas from those bodies without the knowledge of the parents and without an attempt to notify them and request consent. The parents became aware of the coroner's actions in September 1999 and subsequently filed this § 1983 action alleging a deprivation of their property without due process of law in violation of the Fourteenth Amendment.[2]

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[1] California Government Code § 27491.47(a) stated:

> Notwithstanding any other provision of law, the coroner may, in the course of an autopsy, remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody, if . . . [t]he coroner has no knowledge of objection to the removal . . . .

[2] 42 U.S.C. § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The coroner filed a Rule 12(b)(6) motion to dismiss, arguing that the parents could not have a property interest in their deceased children's corneas. The coroner also argued that to the extent the parents did have due process rights, they were required to exhaust state post-deprivation remedies prior to bringing suit. The district court granted the motion to dismiss prior to a scheduled hearing and without a written opinion explaining the basis for the dismissal. We review de novo, *Schneider,* 151 F.3d at 1196, to assess whether "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

II. PROPERTY INTERESTS IN DEAD BODIES

The Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. At the threshold, a claim under § 1983 for an unconstitutional deprivation of property must show (1) a deprivation (2) of property (3) under color of state law. *See Parratt v. Taylor,* 451 U.S. 527, 536-37 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327 (1986). If these elements are met, the question becomes whether the state afforded constitutionally adequate process for the deprivation. *Id.* at 537. Here, it is uncontested that the coroner's action was a deprivation under color of state law. The coroner argues, however, that the dismissal of the parents' complaint was proper because they could not have a property interest in their children's corneas.

Since *Rochin v. California,* 342 U.S. 165 (1952), the Supreme Court repeatedly has affirmed that "the right of

every individual to the possession and control of his own person, free from all restraint or interference of others," *Union Pacific Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891), is "so rooted in the traditions and conscience of our people," *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934), *overruled in part, Malloy v. Hogan,* 378 U.S. 1 (1964), as to be ranked as one of the fundamental liberties protected by the "substantive" component of the Due Process Clause. *See Schmerber v. California,* 384 U.S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society."); *Rochin,* 342 U.S. at 174 (describing unauthorized physical invasions of the body as "offensive to human dignity"). This liberty, the Court has "strongly suggested," extends to the personal decisions about "how to best protect dignity and independence at the end of life." *Washington v. Glucksberg,* 521 U.S. 702, 716, 720 (1997); *Cruzan v. Missouri Dep't of Health,* 497 U.S. 261, 302, 305 (Brennan, J. dissenting) (expressing the view that a right "to choose to die with dignity" flows from "[t]he right . . . to determine what shall be done with one's own body, [which] *is* deeply rooted in this Nation's traditions . . . and is securely grounded in the earliest common law"). The Court has not had occasion to address whether the rights of possession and control of one's own body, the most "sacred" and "carefully guarded" of all rights in the common law, *Botsford,* 141 U.S. at 251, are property interests protected by the Due Process Clause. Nor has it addressed what Due Process protections are applicable to the rights of next of kin to possess and control the bodies of their deceased relatives.

"[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Board of Regents v. Roth,* 408

U.S. 564, 571-72 (1972).[3] "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired[.]" *Id.* at 576.[4] These property interests "are not created by the Constitution[,] . . . they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Id.* at 577. Thus, the first step of our analysis is to analyze the history of rules and understandings of our nation with respect to the possession and protection of the bodies of the dead.

A. History of Common Law Interests in Dead Bodies

Duties to protect the dignity of the human body after its death are deeply rooted in our nation's history. In a valuable history of the subject, the Supreme Court of Rhode Island recounted:

> By the civil law of ancient Rome, the charge of burial was first upon the person to whom it was delegated by the deceased; second, upon the *scripti haeredes* (to whom the property was

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[3] *See* Morton J. Horwitz, *The Transformation of American Law: 1870-1960* 145 (1992) (describing the transformation of the concept of property after the Civil War away from "the prevailing emphasis in traditional law . . . on a 'physicalist' definition of property derived from land").

[4] *See* Arthur Linton Corbin, *Taxation of Seats on the Stock Exchange,* 31 Yale L.J. 429, 429 (1922) ("Our concept of property has shifted .... '[P]roperty' has ceased to describe any res, or object of sense, at all, and has become merely a bundle of legal relations – rights, powers, privileges, immunities.")

> given), and if none, then upon the *haeredes legitimi* or *cognati* in order . . . . The heirs might be compelled to comply with the provisions of the will in regard to burial. And the Pontifical College had the power of providing for the burial of those who had no place of burial in their own right.

Pierce v. Proprietors of Swan Point Cemetery, 10 R.I. 227, 235-36 (1872) (citations omitted).

In 17th century England, and in much of Europe, duties to bury the dead and protect the dignified disposition of the body, described as flowing from a "*right of burial,* . . . a person's *right* to be buried," *id.* at 238-39; *accord In re Johnsons's Estate,* 7 N.Y.S.2d 81, 84 (N.Y. Surr. Ct. 1938) (explaining that in 17th century England, "[a] man had a right to the decent interment of his own body in expectation of the day of resurrection"),[5] were borne primarily by churches, which had a duty to bury the

[5] The logical relationship between rights and duties has been the subject of considerable academic examination. Wesley Hohfeld famously described rights and duties as "jural correlatives" – different aspects of the same legal relation. *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,* 23 Yale L.J. 16 (1913); *see also* Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld,* 1982 Wis. L.Rev. 975; Arthur Corbin, *Jural Relations and Their Classfication,* 30 Yale L.J. 226 (1921). Oliver Wendell Holmes described rights as "intellectual constructs used to describe the consequences of legal obligations. As he puts it [in *The Common Law* (1881)], 'legal duties are logically antecedent to legal rights.'" Horowitz, *supra* at 138. Holmes' description appears particularly apt in respect to the law regarding dead bodies where duties to provide burial were recognized as flowing from a right of the dead, even though "strictly speaking, . . . a dead man cannot be said to have rights." *Pierce,* 10 R.I. at 239.

bodies of those residing in their parishes. *Pierce,* 10 R.I. at 236. These duties, and the explanation of their genesis in the rights of the dead, carried over into New England colonial practice where "[i]n many parts . . . the parish system prevailed, and every family was considered to have a right of burial in the churchyard of the parish in which they lived." *Id.* at 235.

The Roman practice of including duties to protect the body of the dead in civil law had no parallel in the early English common law because burials were matters of ecclesiastical cognizance. *Id.* Thus, Blackstone explained that "though the heir has a property [interest] in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any suit or action against such as indecently, at least, if not injuriously, violate and disturb their remains, when dead and buried." *Bessemer Land & Improvement Co. v. Jenkins,* 18 So. 565, 567 (Ala. 1895) (quoting 1 Bl. Comm. 429); *see also In re Johnsons's Estate,* 7 N.Y.S.2d at 83 (discussing Lord Coke's assertion that "buriall of the cadaver . . . is nullius in bonis, and belongs to ecclesiastical cognisance").

A change in the common law in England can be traced to the 1840 case of *Rex v. Stewart,* 12 AD. & E. 773 (1840). In that case, the socially recognized right of the dead to a dignified disposition, previously enforced only through ecclesiastical courts, was interpreted as creating enforceable common law duties. The question before the court was whether the hospital in which "a pauper" died or the parish in which she was to be buried was under a duty to carry the body to the grave. *Id.* at 774. The court expressed "extreme difficulty in placing . . . any legal foundation" for either rule, but stated it was unwilling to discharge the case "considering how long the practice had

prevailed, and been sanctioned, of burying such persons at the expense of the parish, and the general consequences of holding that such practice ha[d] no warrant in law." *Id.* at 776-77. It stated the premises that, under long-standing tradition, "[e]very person . . . has a right to Christian burial . . . that implies the right to be carried from the place where his body lies to the parish cemetery" and "bodies . . . carried in a state of naked exposure to the grave[ ] would be a real offence to the living, as well as an apparent indignity to the dead." *Id.* at 777-78. From these traditional understandings, the court concluded that "[t]he feelings and interests of the living require" that "the common law cast[ ] on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose." *Id.* at 778. That duty, it held, was imposed on "the individual under whose roof a poor person dies . . . : he cannot keep him unburied, nor do any thing which prevents Christian burial: he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living: and for the same reason, he cannot carry him uncovered to the grave." *Id.* at 778-79.

Many early American courts adopted Blackstone's description of the common law, holding that "a dead body is not the subject of property right." *Bessemer Land,* 18 So. at 567. The duty to protect the body by providing a burial was often described as flowing from the "universal . . . right of sepulture," rather than from a concept of property law. *Wynkoop v. Wynkoop,* 42 Pa. 293, 300-01 (1862). As cases involving unauthorized mutilation and disposition of bodies increased toward the end of the 19th century, paralleling the rise in demand for human cadavers in

medical science and use of cremation as an alternative to burial, *see In re Johnson's Estate,* 7 N.Y.S.2d at 85-86 (describing "an outpouring" of such cases), courts began to recognize an exclusive right of the next of kin to possess and control the disposition of the bodies of their dead relatives, the violation of which was actionable at law. Thus, in holding that a city council could not "seize upon existing private burial grounds, make them public, and exclude the proprietors from their management," the Supreme Court of Indiana commented that "the burial of the dead can [not] . . . be taken out of the hands of the relatives thereof" because "we lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated." *Bogert v. City of Indianapolis,* 13 Ind. 134, 136, 138 (1859).[6] Over a decade later,

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[6] *Bogert* attributed the rule that dead bodies "belong to the surviving relations . . . as property" to a report by the Honorable Samuel B. Ruggles, special master to the State Supreme Court of New York, 4 Bradford's Surrogate 503, 503-532 (1856). Ruggles was appointed to analyze the legal implications of relocating some graves to complete the widening of Beekman street. He "submitted the following conclusion[s], as justly deducible from the fact, that no ecclesiastical element existed in the jurisprudence of the state of New York":

> 1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind.
>
> 2. That the right to bury a corpse and to preserve its remains, is a legal right, which the Courts of law will recognize and protect.
>
> 3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.

(Continued on following page)

the Rhode Island Supreme Court described the nation's common law as bestowing upon next of kin "a duty [towards the dead], and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation"; a dead body "may therefore be considered as a sort of *quasi* property." *Pierce,* 10 R.I. at 238.

B. Interests in Dead Bodies in California Law

In 1872, the same year *Pierce* was decided, California enacted Penal Code § 292, imposing a legal duty on next of kin to bury the deceased. *See* Cal. Penal Code § 292 (West 2002), Historical and Statutory Notes. In 1899, the California Supreme Court held that duty required recognition of exclusive rights of possession, control and disposition vesting in those with the duty. *O'Donnell v. Slack,* 55 P. 906, 907 (Cal. 1899). These rights, it explained, were by law "protected, and for a violation of which [next of kin] are entitled to indemnification." *Id.*

At issue in *O'Donnel* was a probate court's order that a third party "stranger in blood" be charged with removing O'Donnel's body to his desired grave in Ireland. His wife, who was too sick to move the body immediately, objected that only she had the right to accompany the body and

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4. That the right to protect the remains, includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.

5. That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reinterring their remains.

Bogert, 13 Ind. at 140 n.1.

refused to consent to anyone else being given that charge. Relying heavily on the reasoning of *Pierce,* the California Supreme Court explained:

> The duty of the burial of the dead is made an express legal obligation [by Penal Code § 292]; but aside from the obligation, there is a right, well defined and universally recognized, that in disposing of the body of deceased the last sad offices belong of right to the next of kin . . . . This right had its origin in sentiment, in affection for the dead, in religious belief in some form of future life. It therefore early became a subject of cognizance by the ecclesiastical courts. But, while thus having its origin in affection and religious sentiment, it soon came to be recognized as a strictly legal right; and the next of kin, while not, in the full proprietary sense, 'owning' the body of the deceased, have property rights in the body . . . .

Id. The court annulled the order of the probate court, holding the next of kin's rights of possession and control of the body exclusive of others. *Id.* at 907-08.

One year later, in *Enos v. Snyder,* 63 P. 170 (Cal. 1900), the California Supreme Court upheld the interests of next of kin in relation to dead bodies. In that case, Mr. Enos had directed in his will that his burial be " 'according to the wishes and directions of Mrs. R.J. Snyder,' " with whom he was living when he died. *Id.* at 171. His wife and daughter, as next of kin, sued Snyder for possession and control of the body for its disposition. Thus was raised the question: "did the respondents, as next of kin, have the right to the possession of the body of the deceased for the purpose of burying it, as against the appellants, who claim that right under the will?" *Id.* The court resolved the question in favor of the next of kin. In doing so, it held: "in

the absence of statutory provisions, there is no property in a dead body, that it is not part of the estate of the deceased person, and that a man cannot by will dispose of that which after his death will be his corpse." *Id.*

The holding of *Enos* that a person cannot by will dispose of his corpse was abrogated by statute. *See In re Henderson's Estate,* 57 P.2d 212, 215 (Cal. Ct. App. 1936). The explanation that "there is no property in a dead body" has been modified by most courts addressing the subject. Following *O'Donnel* and *Pierce,* California courts commonly use the term "quasi property" to describe the rights of next of kin to the body of the deceased. *See Holm v. Superior Court,* 232 Cal. Rptr. 432, 435 (Cal. Ct. App. 1986); *Sinai Temple v. Kaplan,* 127 Cal. Rptr. 80, 85 n.13 (Cal. Ct. App. 1976); *Cohen v. Groman Mortuary, Inc.,* 41 Cal. Rptr. 481, 483 (Cal. Ct. App. 1964), *overruled on other grounds, Christensen v. Superior Court,* 820 P.2d 181 (1991).

In 1931, the exclusive rights of possession, control and disposition of the corpse recognized in *O'Donnel,* together with the duty previously contained in Penal Code § 292, were codified in Health and Safety Code § 7100.[7] California has at

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[7] At the time relevant to this case, the statute read:

The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in, and the duty of interment and the liability for the reasonable cost of interment of such remains devolves upon the following in the order named:

(a) The surviving spouse.

(b) The surviving child or children of the decedent.

(c) The surviving parent or parents of the decedent.

(Continued on following page)

all times recognized these rights as exclusive of others. Thus civil litigants have no right to demand an autopsy, *Walsh v. Caidin,* 283 Cal. Rptr. 326, 328 (Cal. Ct. App. 1991); *Holm,* 232 Cal. Rptr. at 437, and friends of the deceased have no right to attend the burial, *Ross v. Forest Lawn Mem'l Park,* 203 Cal. Rptr. 468, 472 (Cal. Ct. App. 1984), over the objection of next of kin. Violation of the correlative duty of others to refrain from disturbing the body is subject to an action for "tortious interference with a right to dispose of a decedent's remains." *Sinai Temple,* 127 Cal. Rptr. at 86; *cf. Christensen,* 820 P.2d at 196 (permitting action for unauthorized harvesting of corneas and other organs by mortuary); *Palmquist v. Standard Acc. Ins. Co.,* 3 F. Supp. 358, 359-360 (S.D. Cal. 1933) (permitting action for unauthorized retention of organs after an autopsy).

C. The Right to Transfer Body Parts

The first successful transplantation of a kidney in 1954 led to an expansion of the rights of next of kin to the bodies of the dead. In 1968, the National Conference of Commissioners on Uniform State Laws approved the Uniform Anatomical Gift Act (UAGA), adopted by California the same year, which grants next of kin the right to transfer the parts of bodies in their possession to others

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(d) The person or persons respectively in the next degrees of kindred in the order named by the laws of California as entitled to succeed to the estate of the decedent.

(e) The public administrator when the deceased has sufficient assets.

Id. (amended 1999).

for medical or research purposes. Cal. Health & Safety Code § 7150 *et seq.* The right to transfer is limited. The California UAGA prohibits any person from "knowingly, for valuable consideration, purchas[ing] or sell[ing] a part for transplantation, therapy, or reconditioning, if removal of the part is intended to occur after the death of the decedent," Cal. Health & Safety Code § 7155, as does federal law, 42 U.S.C. § 274e (prohibiting the "transfer [of] any human organ for valuable consideration");[8] *cf. Finley v. Atl. Transp. Co.*, 115 N.E. 715, 717 (N.Y. 1917) ("[T]here is no right of property in a dead body . . . as understood in the commercial sense."); *Larson v. Chase*, 50 N.W. 238, 239 (Minn. 1891) ("[A] dead body is not property in the common commercial sense of that term[.]").

In the 1970s and 1980s, medical science improvements and the related demand for transplant organs prompted governments to search for new ways to increase the supply of organs for donation. *See* National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat 2339 (1984) (establishing Task Force on Organ Transplantation and the Organ Procurement and Transplantation Network); S.Rep. No. 98-382, at 2-4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3975, 3976-78 (discussing "major advances . . . in the science of human organ transplantation," and the "need[ ] . . . to encourage organ donation" to meet a

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[8] One commentator has argued that the "the very existence of a law forbidding commercial alienation of organs paradoxically portrays the human body as 'an article of commerce' that lies within the purview of congressional power and would otherwise be subject to sale on the market." Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L.Rev. 359, 376 (2000).

supply "far short" of demand). Many perceived as a hindrance to the supply of needed organs the rule implicit in the UAGA that donations could be effected only if consent was received from the decedent or next of kin. Erik S. Jaffe, *"She's Got Bette Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses,* 90 Colum. L. Rev. 528, 535 (1990); *cf.* S. Rep. 98-382 at 2 (discussing estimates that "organs are . . . recovered from fewer than 15 percent" of people who die under circumstances that make them suitable donors). In response, some states passed "presumed consent" laws that allow the taking and transfer of body parts by a coroner without the consent of next of kin as long as no objection to the removal is known. Jaffe, *supra* at 535-36.[9] California Government Code § 27491.47, enacted in 1983, was such a law.[10]

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[9] Other laws, including the 1987 version of the UAGA, authorize the taking of body parts without consent only where a reasonable effort has been made to locate the next of kin and obtain consent to the transfer. Jaffe, *supra* at 536-537. The majority of states adhere to the original version of the UAGA, which requires consent from the donee or next of kin for any transfer of organs. *Id.* at 538.

[10] In 1998, § 27491.47(a)(2) was amended to require that the coroner obtain written or telephonic consent of the next of kin prior to removing corneas. The Committee Report accompanying that change in law argued that "existing law governing corneal tissue removal does not adequately reflect the importance of obtaining the consent of a decedent's next-of-kin .... [A]natomical gifts are ... 'gifts' and ... the removal of corneal tissue without the consent of a decedent's next-of-kin violates the legally recognized principle that . . . an individual's right to make or decline to make an anatomical gift [is] passed on to the next-of-kin." S. Com. Rep. S.B. 1403 (1998).

III. DUE PROCESS ANALYSIS

"[T]o provide California non-profit eye banks with an adequate supply of corneal tissue," S. Com. Rep. SB 21 (Cal. 1983), § 27491.47(a) authorized the coroner to "remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner's custody" without any effort to notify and obtain the consent of next of kin "if . . . [t]he coroner has no knowledge of objection to the removal." The law also provided that the coroner or any person acting upon his or her request "shall [not] incur civil liability for such removal in an action brought by any person who did not object prior to the removal . . . nor be subject to criminal prosecution." § 27491.47(b).[11]

In analyzing whether the implementation of that law by the coroner deprived the parents of property, we define property as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . In other words, it deals with what lawyers term the individual's 'interest' in the thing in question." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *accord Phillips v. Washington Legal Found.*, 524 U.S. 156, 167-68, (1998); *cf. Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (explaining that "'property' denotes a broad range of interests"). "To have a property interest . . . a person clearly must have more

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[11] For body parts other than corneas, California adopted the 1987 version of the UAGA authorizing transfer when no knowledge of objection is known and after "[a] reasonable effort has been made to locate and inform [next of kin] of their option to make, or object to making, an anatomical gift." Cal. Health & Safety Code § 7151.5(a)(2).

than an abstract need or desire" for the thing in question, "[h]e must, instead, have a legitimate claim of entitlement to it .... It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." *Id.*

In two decisions the Sixth Circuit, the only federal circuit to address the issue until now, held that the interests of next of kin in dead bodies recognized in Michigan and Ohio allowed next of kin to bring § 1983 actions challenging implementation of cornea removal statutes similar to California's. *Whaley v. County of Tuscola,* 58 F.3d 1111 (6th Cir. 1995) (Michigan); *Brotherton v. Cleveland,* 923 F.2d 477 (6th Cir. 1991) (Ohio). The Sixth Circuit noted that courts in each state had recognized a right of next of kin to possess the body for burial and a claim by next of kin against others who disturb the body. *Whaley,* 58 F.3d at 1116; *Brotherton,* 923 F.2d at 482. Those common law rights, combined with the statutory right to control the disposition of the body recognized in each state's adoption of the UAGA, was held to be sufficient to create in next of kin a property interest in the corneas of their deceased relatives that could not be taken without due process of law. *Whaley,* 58 F.3d at 1117; *Brotherton,* 923 F.2d at 482.

The supreme courts of Florida and Georgia, however, have held that similar legal interests of next of kin in the possession of the body of a deceased family member, recognized as "quasi property" rights in each state, are "not ... of constitutional dimension." *Georgia Lions Eye Bank, Inc. v. Lavant,* 335 S.E.2d 127, 128 (Ga. 1985); *State v. Powell,* 497 So.2d 1188, 1191 (Fla. 1986) (commenting that "[a]ll authorities generally agree that the next of kin have no property right in the remains of a decedent"). The

Florida Supreme Court recently rejected the broad implications of the reasoning in *Powell,* distinguishing that decision as turning on a balance between the public health interest in cornea donation and the " 'infinitesimally small intrusion' " of their removal. *Crocker v. Pleasant,* 778 So.2d 978, 985, 988 (Fla. 2001) (allowing a § 1983 action to go forward for interference with the right of next of kin to possess the body of their son because "in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition").[12]

We agree with the reasoning of the Sixth Circuit and believe that reasoning is applicable here. Under traditional common law principles, serving a duty to protect the dignity of the human body in its final disposition that is deeply rooted in our legal history and social traditions, the parents had exclusive and legitimate claims of entitlement to possess, control, dispose and prevent the violation of the corneas and other parts of the bodies of their deceased children. With California's adoption of the UAGA, Cal. Health and Safety Code § 7151.5, it statutorily recognized other important rights of the parents in relation to the bodies of their deceased children – the right to transfer body parts and refuse to allow their transfer. These are all important components of the group of rights by which

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[12] The Michigan Court of Appeals held that the rights of the next of kin to possess and control the body for burial do not create a constitutionally protected *privacy* interest in the next of kin because that interest "ends with the death of the person to whom it is of value." *Tillman v. Detroit Receiving Hosp.,* 360 N.W.2d 275, 277 (Mich. Ct. App. 1984). We need not address that issue here because the parents have limited their due process interest to one of property.

property is defined, each of which carried with it the power to exclude others from its exercise, "traditionally . . . one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-436 (1982); *see* Thomas W. Merrill, *Property and the Right To Exclude,* 77 Neb. L. Rev. 730, 740-752 (1998) (discussing the "primacy of the right to exclude"); Jeremy Bentham, *The Limits of Jurisprudence Defined* 164 (Charles Warren Everett ed., 1945) (stating that "[t]o give a man a property" interest in a thing, there must be "a mandate prohibiting persons at large from meddling with it"). Thus, we hold that the parents had property interests in the corneas of their deceased children protected by the Due Process Clause of the Fourteenth Amendment.

Our holding is not affected by California's labeling of the interests of the next of kin as "quasi property," a term with little meaningful legal significance.[13] "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a

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[13] The Supreme Court has used the term to identify a property interest only once. In *International News Service v. Associated Press,* 248 U.S. 215, 236-242 (1918) the majority held that news "must be regarded as quasi property," the taking of which without consent constitutes the basis for an unfair competition action. The Court's label did not affect the holding of the case. There is no entry for "quasi property" in Blacks Law Dictionary (6th Ed. 1990) or Ballentine's Law Dictionary (3d ed. 1969), although each contains entries for "quasi contract." The only examples of "quasi property" listed under the entry in Words and Phrases are news, citing *International News Service,* and dead bodies. 35A Words and Phrases 487 (1965); *see id.* (2000 cumulative supp.).

'legitimate claim or entitlement' protected by the Due Process Clause." *Memphis Light, Gas and Water Div. v. Craft,* 436 U.S. 1, 9 (1978). As the Sixth Circuit correctly recounted in *Whaley* and *Brotherton,* the identification of property interests under constitutional law turns on the substance of the interest recognized, not the name given that interest by the state. *See Whaley,* 58 F.3d at 1114 (explaining that courts must "look beyond the law's nomenclature and to its substance"); *Brotherton,* 923 F.2d at 482 (holding that rights of next of kin in Ohio "form a substantial interest in the dead body, regardless of Ohio's classification of that interest"). Thus in *Brotherton,* the interests created by Ohio law were recognized as constitutionally protected property interests despite Ohio courts not characterizing the rights of next of kin to dead bodies as "quasi-property right[s]," as have "a majority of the courts confronted with the issue." *Brotherton,* 923 F.2d at 480. Similarly, in *Whaley,* the court recognized that next of kin in Michigan possessed constitutionally protected property rights to the corneas of deceased relatives even though "Michigan has repeatedly emphasized" that recovery for violation of the rights of next of kin "'is not for the damage to the corpse *as property.*'" *Whaley,* 58 F.3d at 1116 (quoting *Keyes v. Konkel,* 78 N.W.2d 649, 649 (1899)). Our holding similarly turns on the substance of the rights California recognizes, not on the label given to them.

Nor does the fact that California forbids the trade of body parts for profit mean that next of kin lack a property interest in them. The Supreme Court has "never held that a physical item is not 'property' simply because it lacks a positive economic or market value." *Phillips,* 524 U.S. at 169; *cf. Int'l News Service v. Assoc. Press,* 248 U.S. 215,

246 (1918) (Holmes, J. dissenting) ("Property, a creation of law, does not arise from value . . . . ").

Because the property interests of next of kin to dead bodies are firmly entrenched in the "background principles of property law," based on values and understandings contained in our legal history dating from the Roman Empire, California may not be free to alter them with exceptions that lack "a firm basis in traditional property principles." *Phillips,* 524 U.S. at 165-68 (holding that state could legislatively exempt income only trusts and community property from long established rule that interest follows principle because those exceptions "have a historical pedigree"); *accord Washington Legal Found. v. Legal Found. of Washington,* 271 F.3d 835, 852-53 (9th Cir. 2001) (en banc); *Schneider,* 151 F.3d at 1200-01; *cf. PruneYard Shopping Center v. Robins,* 447 U.S. 74, 93-94 (1980) (Marshall, J. concurring) ("[T]here are limits on governmental authority to abolish 'core' common-law rights.").[14] We need not, however, decide whether California has transgressed basic property principles with enactment of § 27491.47 because that statute did not extinguish California's legal recognition of the property interests of the parents to the corneas of their deceased children. It allowed the removal of corneas only if "the coroner has no

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[14] Of course, states may choose between multiple legal rules that are consistent with the basic principles of the common law "at the will, or even the whim, of the legislature." *Munn v. Illinois,* 94 U.S. 113, 134 (1876); *accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 88 n. 32 (1978) ("Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' ") (quoting *Second Employers' Liability Cases,* 223 U.S. 1, 50 (1912)) (emphasis added).

knowledge of objection," a provision that implicitly acknowledges the ongoing property interests of next of kin.[15]

The effect of § 27491.47 was to remove a procedure – notice and request for consent prior to the deprivation – and a remedy – the opportunity to seek redress for the deprivation in California's courts. A state may not evade due process analysis by defining "'[p]roperty' . . . by the procedures provided for its deprivation." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 541 (1985). "While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* (citations omitted). With § 27491.47, California eliminated procedural safeguards but retained the interest.

When the coroner removed the corneas from the bodies of the parents' deceased children and transferred them to others, the parents could no longer possess, control, dispose or prevent the violation of those parts of their children's bodies. To borrow a metaphor used when the government physically occupies property, the coroner did not merely "take a single 'strand' from the 'bundle' of property rights: it chop[ped] through the bundle, taking a

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[15] In this respect, § 27491.47(a) differs from California law governing the state's duty to conduct autopsies to determine the cause of death which may be performed contrary to the wishes of the individual or next of kin. *See* Cal. Govt. Code § 27491; *Huntly v. Zurich Gen. Accident & Liab. Ins. Co.,* 280 P. 163 (Cal. Dist. Ct. App. 1929) (holding next of kin have no right to prohibit state from performing invasive autopsy to determine cause of death).

slice of every strand." *Loretto,* 458 U.S. at 435. This was a deprivation of the most certain variety.

At bottom, "[p]roperty rights serve human values. They are recognized to that end, and are limited by it." *State v. Shack,* 277 A.2d 369, 372 (N.J. 1971). The property rights that California affords to next of kin to the body of their deceased relatives serve the premium value our society has historically placed on protecting the dignity of the human body in its final disposition. California infringed the dignity of the bodies of the children when it extracted the corneas from those bodies without the consent of the parents. The process of law was due the parents for this deprivation of their rights.

IV. POSTDEPRIVATION PROCESS

The scope of the process of law that was due the parents is not a question that we can answer based on the pleadings alone. This question must be addressed in future proceedings.

The coroner's argument that, as a matter of law, postdeprivation process is sufficient and the parents should therefore be required to exhaust postdeprivation procedures must fail.[16] "[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 434 (1982). The

[16] We are at a loss to understand what postdeprivation procedures might be available to the parents given that § 27491.47(b) removed their ability to seek civil redress in California's courts or press a criminal claim.

timing of a hearing depends upon the accommodation of competing interests including the importance of the private interests, the length or finality of the deprivation and the magnitude of governmental interest. *Id.; Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). But, absent "extraordinary situations," *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971), such as "'the necessity of quick action by the State or the impracticality of providing any predeprivation process,'" the deprivation of property resulting from an established state procedure does not meet due process requirements without a predeprivation hearing. *Logan,* 455 U.S. at 436 (quoting *Parratt,* 451 U.S. at 539); *accord Hudson v. Palmer,* 468 U.S. 517, 532 (1984) ("[P]ostdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action."). The coroner's removal of corneas was in accordance with the state procedures established by § 27491.47(a). Whether extraordinary situations justify the failure of the coroner to afford a predeprivation hearing turns on issues of fact that cannot be properly examined at this stage of the litigation.

We do not hold that California lacks significant interests in obtaining corneas or other organs of the deceased in order to contribute to the lives of the living. Courts are required to evaluate carefully the state's interests in deciding what process must be due the holders of property interests for their deprivation. *Logan,* 455 U.S. at 434; *Mathews,* 424 U.S. at 335. An interest so central to the state's core police powers as improving the health of its citizens is certainly one that must be considered seriously in determining what process the parents were due. *See Cruzan,* 497 U.S. at 262 (explaining that states have

an "unqualified interest in the preservation of human life"). But our Constitution requires the government to assert its interests and subject them to scrutiny when it invades the rights of its subjects.[17] Accordingly, we reverse the district court's dismissal of the parents' complaint and remand for proceedings in which the government's justification for its deprivation of parents' interests may be fully aired and appropriately scrutinized.

The dismissal of the parents' § 1983 claim is REVERSED and REMANDED for further proceedings.

FERNANDEZ, Circuit Judge, Dissenting:

I dissent because I do not believe that the asthenic legal interest in a decedent's body, which California confers upon relatives and others, should be treated as a puissant giant for federal constitutional purposes.

To begin with, it has always been true in California that absent a statute "there is no property in a dead body." *Enos v. Snyder*, 131 Cal. 68, 69, 63 P. 170, 171 (1900). For that reason, no action for conversion will lie against someone who is said to have damaged or taken a part of

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[17] It has been said in another context that establishing "a culture of justification – a culture in which every exercise of power is expected to be justified" – lies at the heart of the establishment of constitutional bills of rights. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. Afr. J. Hum. Rts. 31, 32 (1994); *Pharm. Mfr. Ass'n in re: ex parte application of the President of the Republic of South Africa*, 2000(2) SA 674, para 85 n.107 (CC) (describing holding that executive action is subject to rationality review as an "an incident of the 'culture of justification' described by Mureinik").

the body. *See Gray v. S. Pac. Co.*, 21 Cal. App. 2d 240, 246, 68 P.2d 1011, 1015 (1937). To the extent that any right exists, it is, in general, merely a right to possession. *Id.* That right exists solely "for the limited purpose of determining who shall have its custody for burial." *Sinai Temple v. Kaplan,* 54 Cal. App. 3d 1103, 1110, 127 Cal. Rptr. 80, 85 (1976).

Of course, any civilized state desires that the bodies of its deceased members be disposed of in an appropriate way, on grounds of decency, consideration for others, and pragmatism. And it should be done with reasonable haste and without undue acrimony.

California's statutory scheme reflects all of that. It decidedly does not confer a property right upon anyone. Assuming that a decedent has not made his own arrangements for disposal of his own earthly remains,[1] the state makes sure that somebody else will both do so and pay for it. To that end, California has provided that "[t]he right to control the disposition of the remains of a deceased person . . . vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon," a list of individuals. Cal. Health & Safety Code § 7100(a). Thus, this so-called right is actually in the nature of a duty and expense designed to assure that the remains will not simply be left about, but will be quickly interred. And the state has created something like a table of intestate succession for the purpose of assuring that the right and duty land firmly on a defined group. First comes the person who has a power of attorney for healthcare.

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[1] *See* Cal. Health & Safety Code § 7100.1.

Cal. Health & Safety Code § 7100(a)(1). Then comes the spouse. *Id.* at (a)(2). Then adult children, then parents, then next of kin. *Id.* at (a)(3)-(5). At the end is the public administrator, but he only gets the so-called right if there are "sufficient assets" to allow him to discharge his duty. *Id.* at (a)(6). This somewhat remarkable list surely shows just how peculiar it is to dub what we are dealing with a constitutionally protected property right. Is not it interesting that the holder of a power of attorney comes before the closest relatives, and equally interesting to see that the public administrator may wind up with the "right?" Or is it essentially a duty?

I rather think that it is really a duty rather than a right, and because a duty in one person must mean that a right is lodged in someone else, it seems pellucid that the state holds the right to demand that someone on the list bear the burden of disposing of the deceased's remains; it then makes it possible for that person to do so by also giving him the right to do so.[2] Again, that hardly looks like the kind of interest that United States Constitution was designed to protect.

This leads, I think, to a fairly simple proposition: when the state sees to it that the duty, with its necessarily associated right, devolves upon a person, it can constitutionally limit that duty and the right that goes with it. And that is precisely what California did when it declared that the coroner can, in the course of an autopsy, release corneal eye tissue if he "has no knowledge of objection to

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[2] The correlative duty is for others not to interfere with this subsidiary right to inter the decedent and incur an expense.

the removal and release of corneal tissue having been made by the decedent or any other person specified in Section 7151.5 of the Health and Safety Code." Cal. Gov't Code § 27491.47(a) (1983).[3] In that respect, it should be noted that the people referred to in § 7151.5[4] are not precisely the same as the people referred to in § 7100(a). The so-called right to consent, therefore, does not follow the so-called duty, and right, to see to interment. This, again, demonstrates just how asthenic the right conferred by § 7100(a) really is.

Nobody who has had the misfortune of having his loved ones die can fail to be moved by the prospect that somebody else will treat the loved one's former earthly vessel with disrespect. That feeling does not, however, demonstrate that California has conferred a constitutionally protected property right upon family members. In fact, it has not; it has merely given them enough of a right to allow them to fulfill their duty, and it has limited that in a number of ways. One of those ways has to do with corneal tissue. As to that, the duty may not devolve, and concomitantly the right will be neither necessary nor constitutionally protected.

Thus, I respectfully dissent.

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[3] This section has been revised and now refers to § 7151.

[4] The list has been somewhat revised, and is now in Health and Safety Code § 7151(a).

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT NEWMAN as father and next of kin of RICHARD A. NEWMAN and BARBARA OBARSKI as mother and next of kin of KENNETH S. OBARSKI, individually and on behalf of all others similarly situated individuals, Plaintiffs, v. L. SATHYAVAGLSWARAN, M.D., in his official capacity as Chief Medical Examiner-Coroner of the County of Los Angeles, and ANTHONY T. HERNANDEZ, in his official capacity as Director of the County of Los Angeles Coroner's office and COUNTY OF LOS ANGELES; DEPARTMENT OF CORONER, Defendants.	Case No. 99-10751 JSL(AJWx) **~~[PROPOSED]~~ JUDGMENT OF DISMISSAL** [Fed. R. Civ. P. 58] (Filed Mar. 21, 2000) (Entered Mar. 22, 2000)

On February 18, 2000, the Motion to Dismiss of Defendants L. Sathyavaglswaran, M.D., Anthony Hernandez, and the County of Los Angeles, Department of Coroner, came for hearing before the above-entitled Court, the Hon. J. Spencer Letts, United States District Court Judge, presiding. The motion to dismiss was decided without hearing. Based on the papers filed in connection with this

matter, and being fully apprised of the relevant facts and law, Defendants' Motion to Dismiss was GRANTED.

Accordingly,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion to Dismiss of Defendants L. Sathyavaglswaran, M.D., Anthony Hernandez and the County of Los Angeles, Department of Coroner, be, and hereby is, GRANTED, and that judgment be entered in favor of Defendants and against Plaintiffs Robert Newman and Barbara Obarski, and that Defendants recover costs in the amount of $ 0^SL.

DATED: 3/21/00

/s/ Spencer Letts
HON. J. SPENCER LETTS
United States District Judge

PROOF OF SERVICE BY FEDERAL EXPRESS

I, Zanida Premdas Samuels, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of 18 years and am not a party to the within action or proceeding. I am employed by the law firm of Arter & Hadden LLP, located at 725 S. Figueroa Street, Suite 3400, Los Angeles, California 90017-5434. I am readily familiar with Arter & Hadden LLP's business practice for collection and processing of correspondence for overnight delivery by Federal Express. I served the within **[PROPOSED] JUDGMENT OF DISMISSAL** in said cause, by placing a true and correct copy thereof in an envelope addressed as follows:

Bill Colovos, Esq.
13400 Dix-Toledo Road
Southgate, Michigan 48195
Tel: 734-282-2900

and by then sealing said envelope and tendering it for next-day delivery by Federal Express on February 25, 2000, following Arter & Hadden LLP's ordinary business practices for overnight delivery mailing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 25, 2000, at Los Angeles, California.

/s/ Zanida Premdas Samuels
Zanida Premdas Samuels

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT NEWMAN, et al., Plaintiffs, v. L. SATHYAVAGLSWARAN, M.D., et al., Defendants.	) CV 99-10751 JSL) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS) (Filed Feb. 18, 2000)) (Entered Feb. 22, 2000)

The motion of defendants L. SATHYAVAGLSWARAN M.D., et al., to dismiss was decided without hearing on February 1, 2000.

Having reviewed the papers filed in connection with this matter, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion of defendants to dismiss be GRANTED.

IT IS SO ORDERED.

DATED: 2/18/00

/s/ Spencer Letts
J. Spencer Letts
United States District Judge

APPENDIX D

NOT FOR PUBLICTION [sic]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT NEWMAN as father and next of kin of RICHARD A. NEWMAN and BARBARA OBARSKI as mother and next of kin of KENNETH S. OBARSKI, individually and on behalf of all others similarly situated individuals; BARBARA OBARSKI,

Plaintiffs-Appellants,

v.

L. SATHYAVAGLSWARAN, M.D., in his official capacity as Chief Medical Examiner-Coroner of the County of Los Angeles; ANTHONY T. HERNANDEZ, in his official capacity; COUNTY OF LOS ANGELES, Department of the Coroner,

Defendants-Appellees.

No. 00-55504

D.C. No. CV-99-10751-JSL

ORDER

(Filed Jun. 14, 2002)

BEFORE: BROWNING, FERNANDEZ and FISHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and petition for rehearing en banc are denied.